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No. 08-127

Supreme Court, U.S.
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In The
Supreme Court of the United States

RONALD JOHNSON,

Petitioner,

vs.

CITY OF SHOREWOOD; CITY OF MINNETONKA; RILEY-PURGATORY-BLUFF CREEK WATERSHED DISTRICT; TRIVESCO, a partnership; and its Partners; ROBERT H. MASON, INC., a corporation; HIGHLAND PROPERTIES, INC., a corporation; STEINER AND KOPPELMAN, INC., a corporation; and HIGHLAND VILLA BUILDERS, INC., a corporation,

Respondents.

On Petition For A Writ Of Certiorari To The Minnesota Court Of Appeals

REPLY BRIEF OF PETITIONER RONALD JOHNSON

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INTRODUCTION

The opposition briefs of both the City of Shorewood and City of Minnetonka[1] emphasize and ironically support the need for granting Petitioner Ronald Johnson's Writ for Certiorari. While Shorewood outlines and cries of "misstatement of facts" and "misstatements of law," both cities attempt to trivialize the importance of the questions presented regarding state courts applying res judicata and collateral estoppel to preclude as-applied Just Compensation Clause § 1983 claims in cases where state law provides no post-judgment compensation procedures for *subsequent, uncompensated* governmental takings.

I. Shorewood's Outline of Facts Underscores Johnsons As-Applied Just Compensation Clause § 1983 Claim Has Not Been Adjudicated.

"Everyone is entitled to their own opinion, but not their own facts."[2]

Shorewood seeks to, and has to date, successfully prevented Johnson from asserting a 42 U.S.C. § 1983 Just Compensation Clause claim against post-judgment, subsequent and uncompensated governmental encroachment and occupation of his land.

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[1] Only Shorewood and Minnetonka among the parties filed opposition briefs.

[2] Attributed to Daniel Patrick Moynihan, United States Senator, ambassador, administrative official, and academic; March 16, 1927-March 26, 2003.

There is no dispute Shorewood built a "barrier preventing the flow of water"[3] – a dam[4] – or as Shorewood describes it a "pond control structure."[5] There is no dispute flooding occurred and Johnson received damages of $63,000 for "clean-up costs" resulting from one 1984-85 flooding incident adjudicated in 1996.[6]

Furthermore, there is no factual dispute that Johnson received *nothing additional* for a takings claim beyond the 1984-85 costs to repair flood damage for the flooding incident.[7]

Most importantly, there is no factual dispute Johnson received *nothing* for the undisputed continued flooding of his property after the 2000 state court final judgment.

But contrary to Shorewood's outline of "misstatement of facts" and as reflected in the record, flooding continued,[8] Shorewood reneged on promises

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[3] *Webster's New Collegiate Dictionary* 284 (Henry Bosley Woolf, ed., G. & C. Merriam Co. 1981).

[4] *Id.*

[5] City of Shorewood Opposition Brief at 2. *See also* Corps of Engineers description of Shorewood's obstruction as a "road/dam" at App. 96-97.

[6] *Id.* at 2-3.

[7] *Id.* at 3.

[8] Johnson Verified Complaint ¶¶ 149-50; Reply App. at 5-6. *See also,* Reply App. at 1. The record does show that Johnson's property did reflect a ditch for draining since the "the mid-1950's."

to alleviate the flooding[9] – promises made negating any need for Petitioner Johnson's cross-appeal in the initial action[10] – and the flooding resulted from the government's "barrier" impeding the flow of water.

Likewise, there is no dispute that the 2008 Minnesota Court of Appeals decision found no post-judgment compensation procedures existed under state law for Johnson and then, simultaneously, determined that the prior state court judgment denying compensation – the same judgment giving rise to Johnson's § 1983 claims – precluded consideration of Johnson's § 1983 claims due to res judicata and collateral estoppel.[11]

Thus, Johnson's § 1983 claim remains unadjudicated by the state court despite the failure of Shorewood and Minnetonka and the failure of Minnesota's statutes to provide compensation required by the federal Just Compensation Clause for the flooding of Johnson's property since the 2000 state court final judgment.[12]

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[9] *Id.*

[10] *Compare* Johnson Verified Complaint ¶¶ 149-50, Reply App. 5-6, *with* Shorewood's Brief in Opposition at p. 3

[11] Minnesota Court of Appeals decision, App. at 24-29.

[12] As the Honorable Ann Montgomery, now U.S. District Court Judge, declared " . . . the physical invasion of the Johnsons' property during the period in which the pond control structure was operational is an irreversible taking which requires compensation." App. at 157.

Far from receiving "full compensation,"[13] Johnson received nothing and had no opportunity to adjudicate any other asserted facts in dispute[14] to substantiate a takings claim subsequent to one incident of flooding as a result of Shorewood's "culvert/dam,"[15] "road berm, culvert, and pond control structure"[16] – regardless of how it is described.

Importantly, Shorewood's claims of disputed facts – even if true – are not relevant to the loss of Johnson's constitutional claim because of the state court's adoption of an erroneous rule of law.

Johnson sought adjudication of his federal claims in state court, but the state court refused to exercise its jurisdiction to adjudicate his federal claims. Johnson had no fair and full opportunity to have his federal claims heard.

Likewise, since the basis of Johnson's sought for relief is embodied in the lack of state procedures and remedies for post-judgment, subsequent and uncompensated governmental takings, common-law

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[13] City of Shorewood Opposition Brief at 3.

[14] *See, e.g.*, Shorewood Opposition Brief at 4-5 namely, there has been no adjudication of a pre-existing Clean Water Act wetland, contrary to Shorewood's statement, the Army Corps of Engineers never declared the existence of such a wetland. *See also, e.g.*, Supplemental App. 95 noting court documents of Johnson's property reflected a ditch for draining since the "mid-1950's."

[15] *See, e.g.*, Johnson Petition for Writ of Certiorari at p. 2.

[16] City of Shorewood Opposition Brief at 2.

principles of collateral estoppel and res judicata do not apply. Johnson's claim under 42 U.S.C. § 1983 brought under the Fifth Amendment Just Compensation Clause claim should have been simultaneously adjudicated by the state court along with his claim for post-judgment remedies under state law.

At one time this Court stated "abstention 'does not, of course, involve the abdication of federal jurisdiction, but only the postponement of its exercise.'"[17] With *SanRemo Hotel*[18] requiring state courts to simultaneously litigate state and federal takings claims in state court, the Minnesota Court of Appeals has in contradiction adopted an erroneous rule of law which does not require them to litigate as-applied Just Compensation Clause § 1983 claims at all.

The Minnesota Court of Appeals' decision is directly in conflict with the teachings of *SanRemo Hotel* and *Williamson*.[19]

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[17] *England vs. Louisiana State Bd. of Medical Examiners*, 375 U.S. 411, 416 (1964).

[18] *SanRemo Hotel, LP v. City and County of San Francisco, Cal.*, 545 U.S. 323 (2005).

[19] *Williamson County Reg'l Planning Comm. v. Hamilton Bank*, 473 F.Supp. 700 (D. Ariz. 1990).

II. Shorewood's and Minnetonka's Legal Arguments Only Seek to Trivialize the Constitutional Conflict Among the States in Applying *SanRemo Hotel* and *Williamson* Precedent to Asserted Federal Claims for Just Compensation.

Rather than address the petition's arguments at pages 15-29 supporting the nationwide importance of the Petitioner's questions presented,[20] Shorewood's and Minnetonka's legal arguments only seek to

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[20] The questions presented included:

1. After *SanRemo Hotel,* can a state court preclude adjudication of a post-judgment as-applied Just Compensation Clause § 1983 claim, based in part on extrinsic fraud and in part on insufficient constitutionally-guaranteed just compensation, as an impermissible collateral attack on the prior state court judgment?
2. Under *Williamson* and *SanRemo Hotel*, does an as-applied Just Compensation Clause § 1983 claim accure, if ever, when (i) the original taking occurs; (ii) upon entry of the state court condemnation final judgment awarding less compensation than the Just Compensation Clause requires; or (iii) after state court denial of state post-judgment proceedings and remedies?
3. The Court of Appeals found constitutional takings of property for public use not judicially for compensation under the Federal Constitution if the government takings – as a matter of degree – is temporary. May a state court preclude temporary physical takings based on the availability of state law torts against the government such as nuisance or trespass?

trivialize the Petitioner's Writ for Certiorari. Ironically, their efforts underscore the nation-wide importance of the Petition.

A. Shorewood's and Minnetonka's "Collateral Attack" and "Relitigate" Arguments Underscore the Merits of Johnson's Petition and the National Importance of Ensuring Adequate and Equal Application and Adjudication of Landowner's Federal Rights.

Shorewood's brief and Minnetonka's brief argue on the merits that Johnson's as-applied *Williamson* Just Compensation Clause § 1983 claim is an impermissible "collateral attack"[21] and/or an improper attempt to "relitigate" legal issues resolved in the prior proceeding. However, these arguments on the merits only serve to underscore the importance of ensuring equal federal rights for landowners nationwide.

For example, Shorewood and Minnetonka dispute Johnson's interpretation of a critical passage in *SanRemo Hotel*. Yet, the interpretation of this passage, one way or the other, affects landowners' federal rights in all states:

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[21] *See, generally,* 21A Fed. Proc., L. Ed. § 51:221 (collateral attack on judgments); Restatement (Second) of Judgments § 12 (1982) (contesting subject matter jurisdiction in subsequent proceeding).

> With respect to those federal claims that did require ripening, we reject petitioners' contention that *Williamson County* prohibits plaintiffs from advancing their federal claims in state courts. The requirement that aggrieved property owners must seek "compensation through the procedures the State has provided for doing so," 473 U.S., at 194, 105 S.Ct. 3108, does not preclude state courts from hearing simultaneously a plaintiff's request for compensation under state law and the claim that, in the alternative, the denial of compensation would violate the Fifth Amendment of the Federal Constitution.

545 U.S. at 346.

Under present Supreme Court doctrine, landowners in all states should receive consistent treatment regarding their as-applied Just Compensation Clause remedies under 42 U.S.C. § 1983. If Johnsons' Petition is granted, this Court will create and clarify the rules governing "simultaneous" consideration of state remedies and procedures with federal claims of as-applied *Williamson* Just Compensation Clause § 1983 claims.

On the other hand, if left alone, landowners among the states will continue to receive inconsistent treatment and fail to receive a fair and full opportunity to be heard – while others might succeed – losing their constitutional right of equal treatment under the Just Compensation Clause and 42 U.S.C. § 1983.

As the law presently stands, Minnesota state courts deny post-judgment state law remedies and simultaneously apply res judicata and collateral estoppel to bar adjudication of as-applied *Williamson* Just Compensation Clause § 1983 claims.

Under these circumstances, the exercise of state courts to adopt a rule of law inapposite to Supreme Court precedent has and will continue to lead to unequal treatment of landowners asserting Fifth Amendment rights among state courts. The conflict among the state courts and divisive application of as-applied *Williamson* Just Compensation Clause § 1983 claims – such as in California, Connecticut, Texas, and Minnesota – brings uncertainty and instability to litigating federal takings claims in state court.

Granting Johnson's Petition for a Writ of Certiorari, after *SanRemo Hotel*, will offer the Court an opportunity to establish a consistent rule to be applied in the 50 states' courts to ensure equal treatment of as-applied Just Compensation Clause § 1983 claims under *SanRemo Hotel* and *Williamson*.

B. The Opposition Briefs Fail to Respond to the Constitutional Importance of Government Compensating Private Property Owners for Temporary Physical Takings.

Shorewood's and Minnetonka's opposition briefs provide no argument rebutting the constitutional importance for local governments to compensate private property owners for temporary physical

takings as well as permanent physical takings. Whether one week or one year, the length of time government occupies private property is not relevant to the existence of a taking. A private property owner is entitled to compensation for temporary occupations and to assert those takings claim under the Fifth Amendment.

Shorewood, however, in its "Misstatements of Law" section at page 8 suggests that state courts need not compensate governmental temporary physical takings because it is "the degree of interference with property rights" that determines whether a compensable taking occurs.

Shorewood implicitly agrees with Petitioner that the Minnesota Court of Appeals has adopted an erroneous rule of law that civil trespass or nuisance law *trumps* Supreme Court takings jurisprudence. On the one hand, this Court has held the federal Fifth Amendment requires all physical takings be compensated – no matter how small. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982). But, on the other hand, the Minnesota Court of Appeals found:

> If the government's use of the subject matter property was temporary, the landowner *does not have a valid claim for a taking*, but may have a claim in tort for nuisance or trespass.

App. at 36 (emphasis added). Thus, in fact, the Minnesota Court of Appeals consciously ignores *Teleprompter's* instruction that every physical taking, no matter how small, must be compensated.

This Court should grant Petitioner Johnson's Writ for Certiorari to determine whether temporary physical takings are exceptions to *Teleprompter's* mandate that every governmental physical taking, no matter how small, requires compensation.[22]

Respectfully submitted,

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[22] This claim raises another issue regarding federal takings claims under 42 U.S.C. § 1983. If this Petition is denied, can Minnesota landowners bring a § 1983 claim to challenge Minnesota law denying compensation for temporary takings? When did this claim accrue?

ADDENDUM NO. 1
SURVEY OF DRAINAGE DITCH, SURROUNDING SOILS, VEGETATION OBSERVATIONS
RON JOHNSON PROPERTY
SHOREWOOD, MINNESOTA
November 19, 1996
MFRA #10428

Introduction:

This report is addendum No. 1 to McCombs Frank Roos Associates, Inc. (MFRA) reports dated November 3 and 28, 1995. These earlier reports referenced the vegetation on the Johnson site only as a side note, and concentrated on the hydrology of the site which controlled the status of the basin under various wetland regulatory programs. Additional observations and interpretations of the site vegetation as presented here as support to our conclusions on the scope and effect of the drainage ditch prior to and after the city constructed the Waterford Place berm and stormwater pond.

Historical Background:

The following general history was obtained from trials in Hennepin County District Court files No. CD2344 and 91-18099:

> *The low land basin on the Johnson property was ditched in the mid 1950's. The ditch was excavated in a northeast to southwest direction and continued off the Johnson property through a natural ravine that extended to wetland at an elevation of approximately 900*

ft. At that time, the basin consisted of organic soils which supported a mixture of marsh grasses and mature trees. Excess water drained freely through the ditch and preventing [sic] *surface ponding in the basin. The drainage ditch allowed a portion of the basin to be cultivated as evident by the old dead furrows, and the mature wooded areas were used as a pasture. Since 1972, the Johnson's have used the property as an extension of their backyard and had vegetable gardens in the rich soils of the basin.*

In 1984 the City of Shorewood constructed the Waterford Place roadway berm (south of the Johnson property) across the ravine and blocked the ditch. The berm was constructed and no outlet for ditch provided in order to surcharge and compact the soils below the road crossing of the ravine. The berm remained in place for approximately one year, completely preventing any drainage of the Johnson site. An April 1985 aerial photograph shows that the berm had caused water to flood to approximately a 914 elevation, before the spring and summer rains fell. Subsequent rains caused the water levels to rise to an elevation sufficient to cause a "tractor bridge" to float down to the Waterford Place roadway berm. This bridge was replaced with the existing foot bridge at approximately the same location. The impounded water caused the ditch bank to collapse in several areas and sediment and debris filled much of the ditch. The flooding also resulted in damage

to many of the mature trees in the basin and the understory vegetation was drowned out.

* * *

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA
FOURTH DIVISION

RONALD RICHARD JOHNSON; and DEE LUNDBERG JOHNSON,

Plaintiffs,

vs.

CITY OF SHOREWOOD; and its Mayor in his official capacity, WOODY LOVE or his successor; CITY OF MINNETONKA; and its Mayor in her official capacity, KAREN ANDERSON or her successor; RILEY-PURGATORY-BLUFF CREEK WATERSHED DISTRICT; and the Chair of its Board of Managers in his official capacity, CONRAD FISKNESS or his successor; TRIVESCO, a partnership; and its partners ROBERT H. MASON, INC., a corporation; HIGHLAND PROPERTIES, INC., a corporation; and STEINER AND KOPPELMAN, INC., a corporation; HIGHLAND VILLA BUILDERS INC., a corporation; the UNITED STATES; the CORPS OF

Case No. 00-CV-1281 (DWF/AJB)

SECOND AMENDED, SUPPLEMENTED AND VERIFIED COMPLAINT (FILED WITH MOTION SEEKING COURT'S LEAVE TO AMEND AND SUPPLEMENT COMPLAINT)

JURY TRIAL DEMANDED

ENGINEERS OF THE UNITED STATES; the Secretary of the United States Army in his/her official capacity, HONORABLE LOUIS CALDERA or his successor; and the Commander-in-Chief of the Corps of Engineers of the United States in his/her official capacity, LT. GENERAL JOSEPH N. BALLARD or his successor,

Defendants.

* * *

144. Shorewood made promises to Johnson to provide alternative street access from street Waterford Place through city-owned property and then breached the promise. Shorewood breached its promise to honor Johnson's pre-Waterford "tractor" road access that was cut off by the grading of the same city-owned property.

145. Johnson reasonably relied on these and other promises to his detriment. Johnson suffered damages, described above.

146. As a result of Defendants' breach of these and other promises, Plaintiff has suffered damages in excess of $100,000.

COUNT XV: BREACH OF EXPLICIT AND IMPLICIT CONTRACTS

147. All of the allegations of this Complaint are incorporated herein by reference in their entirety.

148. On June 5, 2000, in presence of Johnson and his counsel, the Shorewood official agreed with Johnson that the Defendants shall remove the already-constructed fence and walking trail, and also presumably remove the fiber optic cable – if Defendants did not already own the nonexistent 33 foot Property easement. Defendants, in fact, do not own the nonexistent 33 foot easement and Defendants did not remove the fence, walking trail and fiber optic cable and thereby breached the June 5, 2000 agreement – all out of animus against Johnson.

149. Defendants contracted with Plaintiff to abate the diversion of storm sewage onto Johnson's Property, to stop the flooding, to clean up Johnson's property, provide alternative access from Waterford Place through city-owned property, and allow him to develop it like other land owners. Defendants have not fulfilled their contractual obligations under these express and implicit contracts.

150. Defendants have breached explicit and implicit contracts with Plaintiff to remove the June 5, 2000 fence, walking trail and fiber optic cable, abate the diversion of storm sewage onto Johnsons' Property, to stop the flooding, to clean up Johnson's Property, restore "tractor" access, provide the alternative access, and allow him to develop it like other land owners.

151. Because of Defendants' breaches of these express and implied contracts, Plaintiff has not received the benefits of the agreements, including but not limited to: abatement of the diversion of storm sewage onto Johnson's property, the cessation of the flooding, the cleaning up of Johnson's property, restore "tractor" access, alternative access and development of the property like other land owners.

152. As a result of Defendants' breaches of the contracts, Plaintiff has suffered damages in excess of $100,000.

COUNT XVI: SPECIFIC PERFORMANCE

153. All of the allegations of this Complaint are incorporated herein by reference in their entirety.

154. By the above-mentioned agreements, Johnsons has a right to removal of the June 5, 2000 fence, walking trail and fiber optic cable, abatement of the diversion of storm sewage onto Johnson's Property, the cessation of the flooding, the cleaning up of Johnson's Property, restoration of the tractor road through Outlot C, alternative Outlot C street access and development of the Property like other land owners.

155. But because of Defendants' breaches of the agreements, described above, Defendants appear unwilling or unable to perform their obligations under the agreements.

* * *

10. For an order compelling governmental defendants to abate uncompensated takings or to initiate and conduct condemnation proceedings for the properties taken without payment of just compensation and pay damages and Johnson's litigation costs, costs, expenses, engineering and expert witness fees and reasonable attorney's fees allowed by law.

11. For such other and further relief as the Court deems to be just and equitable.

Dated: June 22, 2000 /s/ Ronald R. Johnson
Ronald R. Johnson

Sworn and subscribed to before me by Erick G. Kaardal on this 22th day of June, 2000.

[SEAL] ERICK G. KAARDAL
NOTARY PUBLIC MINNESOTA
MY COMMISSION EXPIRES 1-31-2005

/s/ Erick G. Kaardal
Notary Public

Dated: June 22, 2000

/s/ Erick G. Kaardal
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RULE 38 DEMAND FOR JURY TRIAL

By the undersigned, the above-named Plaintiffs Ron and Dee Johnson demand pursuant to Rule 38 of the Federal Rules of Civil Procedure a trial by jury of all issues so triable.

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